IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 912

BULLDOG ELECTRIC PRODUCTS CO.,
a Corporation of West Virginia,
Petitioner,

v.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY,
a Corporation of Pennsylvania,
Respondent.

PETITION FOR REHEARING

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, BullDog Electric Products Co. (BullDog) respectfully prays that a rehearing be granted by this Honorable Court with respect to its petition for writ of certiorari which was denied by this Court on March 12, 1945.

STATEMENT

Subsequent to the filing of the petition for writ of certiorari, and the briefs relating to it, there issued from the District Court of the United States for the Northern District of West Virginia, in the related case of Westinghouse Electric and Manufacturing Company, Plaintiff, v. BullDog Electric Products Co., Defendant, Civil Action File No. 229-W, an order signed by United States District Judge, the Honorable W. E. Baker, a copy of which is found in the appendix at the end of this petition, which materially changes the position of the parties, BullDog and Westinghouse, in their circuit breaker patent litigation.

That order of the District Court stayed all proceedings in the West Virginia action, wherein Westinghouse, as plaintiff, sued for patent infringement against BullDog, defendant, on electrical circuit breakers, until determination of the New York proceedings, wherein the same Westinghouse, by its counterclaim for declaratory judgment, attacks and seeks to have declared invalid a certain BullDog patent on electrical circuit breakers*

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*BullDog has attempted to consolidate into one forum the two parts of the circuit breaker controversy between the parties, giving Westinghouse the choice of forum, but without success. See *BullDog Electric Products Co. v. Cole Electric Products Co. and Westinghouse Electric & Mfg. Co., 63 U. S. P. Q. 41.*

ARGUMENT

Up to the time of the West Virginia order, which issued March 2, 1945, BullDog had a right, in the West Virginia suit, to proceed to establish the monopoly, illegal use of patents, and illegal dominance in the circuit breaker business by Westinghouse as a defense to the West Virginia patent infringement suit, in accordance with well-established doctrines. BullDog intended to offer the evidence obtained in the West Virginia action in defending itself against the New York counterclaim, even though BullDog assumed that the New York Court would probably refuse such offer in accordance with its prior action in striking from the BullDog reply to the New York counterclaim the allegation of illegal use of patents by Westinghouse and the illegal objectives of Westinghouse in the New York counterclaim. The West Virginia order, for the time being, may serve to close off BullDog's opportunity to obtain and make available such proof material and BullDog may be in the position of having no basis for obtaining such proof material; the stay of the West Virginia action may cut off one basis, and the striking of the defenses from the New York pleadings may cut off the other basis.

BullDog, therefore, earnestly requests this Court to announce to the parties that the public interest defenses are available to BullDog in the New York counterclaim, so as to enable the parties to test out the monopoly defense without first going through a complicated technical patent trial.

We deplore that which has actually happened in many patent cases, the most notable example of which concerns the very same Westinghouse of this case and concerns the very same line of business, circuit breakers. The case is the recent one of *Frank Adam Electric Company v. Westinghouse Electric and Manufacturing Company*, reported at *64 U. S. P. Q. 147*, decided January 11, 1945, by the Circuit Court of Appeals for the Eighth Circuit.

In that patent infringement case the defendant Frank Adam, prior to trial, sought leave to amend its answer to set forth the public interest defenses of circuit breaker monopoly and illegal use of circuit breaker patents by the plaintiff, Westinghouse. That motion for leave to amend and to plead the public interest defenses was denied because the motion was not timely made. Prior to trial, the defendant sought to take depositions relating to that defense, but the District Court limited the examination to exclude inquiry into the charge of unclean hands.

The parties went to trial on the six patents in suit and during the trial, the defendant offered to prove the illegal monopoly, but the District Court rejected the evidence, presumably on the grounds that the evidence was not within the framework of the pleadings from which was excluded reference to the unclean hands of Westinghouse, plaintiff. The patent trial went against the defendant, who thereupon appealed, and the Circuit Court of Appeals sent the case back to the District Court with instructions to try the unclean-hands issue and to receive the unclean-hands evidence which the District Court had rejected. *Now had the District Court accepted the unclean-hands evidence in the first place, and permitted the defendant to plead the public interest defenses, then there would not*

have been necessary the elaborate and arduous technical patent trial that can become a nullity in the event the District Court finds the public interest defense for the defendant.

It is to prevent exactly the same sort of thing from happening in this case that the petitioner herein asks this court now to declare whether or not illegal use of patents, monopoly, and illegal objectives of a declaratory judgment counter-plaintiff, shall be permitted to be an issue in a suit where one party, accused of monopoly in the circuit breaker business, seeks to enhance that monopoly by destroying outstanding patents of a smaller competitor in the same business, in order to pave the way for the monopolist to assert its own patents.*

We believe that the public interest is best served by a declaration from this Court now that a counter-defendant in a declaratory judgment proceedings shall be permitted to plead and prove the illegal objectives of the counter-plaintiff who brings the declaratory judgment proceeding to attack and destroy the patent of the counter-defendant.

Respectfully,

ABRAHAM J. LEVIN,
DANIEL G. CULLEN,
Counsel for Petitioner.

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*The other defenses of the stricken paragraphs of the reply need no comment at this time, since the public interest defenses alone are of sufficient moment.